IN THE

Supreme Court Of The United States

OCTOBER TERM, 1941

NO._____

HOTEL MARKHAM, INC., ET AL,
Petitioners,

versus

EDWARD BALL, ET AL,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

This is an application for a Writ of Certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, reversing a judgment of the District Court for the Southern District of Mississippi.

OPINION BELOW

The opinion of the Circuit Court of Appeals is included in the Record at pages 643 to 658, inclusive, and is reported in 120 F. 2d, 753. The opinion of the District Judge is not reported, but appears in the Record at pages 606 to 620, inclusive.

JURISDICTIONAL STATEMENT

A jurisdictional statement is included in the Petition filed herein, and appears at pages 7 to 9, supra. This statement is intended to show the jurisdiction of the District

Court, that all steps on appeal and for this application were timely taken, and that this court has full jurisdiction to grant the relief to which Petitioners are entitled, by certiorari.

STATEMENT OF THE CASE

A short statement of the facts appears in the Petition at pages 2 to 7, and is adopted here. The Bondholders' Protective Agreement, referred to in the Petition, appears in the Record at pages 54 to 69, inclusive. Particular attention is called to Paragraph Seven of the Protective Agreement (R. p. 61), which provides (R. p. 63) that the Committee may cause a corporation to be organized to take and hold the properties belonging to or acquired by the trust, charged in such manner as the Committee should deem appropriate. Petitioner, Hotel Markham, Inc., (herinafter referred to as the Trustee Corporation) was created by the Committee under this provision of the Protective Agreement[1]. The capital structure of the corporation was the issue of no par value stock, set up on its books at $5.00 per share at the rate of one share for each $100.00 of bonds and coupons held by the Committee; gold cumulative interest bearing debentures, interest payable as earned, to mature on November 1, 1940, in the amount of the bonds and coupons, or $598,960; the asumption of the obligations arising from a prior lien to secure $50,000 to pay cost of foreclosure and provide working capital; the acquisition of additional facilities not covered by the original mortgage, but which were necessary to the conduct of the business; and liability for all accrued taxes and cost of operation, repairs and improvements accrued and to accrue. As against this, it ac-

[1]See Resolution of the Committee as set out in the Record at Pages 89 to 91, inclusive.

quired the mortgaged properties, originally constructed at a cost in excess of $1,000,000, but not then regarded as having value in excess of $100,000[2].

Obviously, the Trustee Corporation was not a going concern, and could not be made so on a reorganization that would not destroy the value of its securities. The securities mentioned were accepted by the trustees and placed in the depository to be held for the Committee as the trustees thereof with all powers, rights and privileges vested in them by the Protective Agreement, but to be allocated, subject to such ownership and control, to certificates of participation in the trust to be issued by the depository on the surrender of the depository receipts issued when the bonds were surrendered under the Protective Agreement.

As to these facts, there seems to be no controversy. It does not appear that the Court of Appeals thought, or that Respondents contend, that the powers of the Committee would have been impaired by lapse of time, or by the action taken under the option in the debenture mortgage to refund the debentures for principal and unpaid interest, except for the execution of the Committee of a declaration of trust[3] on the 5th day of August, 1930, after the mortgaged property had been acquired by the Committee, but before its transfer to the Trustee Corporation. Particular care was taken in the preparation of the trust agreement to preserve all the rights of the bondholders under the Protective Agreement, as well as the ownership and powers of the Committee under that instrument[4]. The effect of the Declaration of Trust was to convert the trust from one resulting in law by the fact

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[2]R. 574. The 12½ per cent. price refers to the original issue of $600,000 of bonds of Gulfport Hotel Company.

[3]R. 71 to 81.

[4]Cf. R. 61 and R. 72. See particularly R. 77.

of acquisition of the properties with the assets of the beneficiaries, to a documentary express trust within the Mississippi Statute of Frauds[5]. To some extent, it was an exercise of the power of the Committee to reform the Protective Agreement under the provisions of Paragraph Twelve thereof[6], but especially it was an exposition of the duties and authority of the Committee thereunder. It was not a termination of the resulting trust in the physical properties acquired by the Committee with the assets of the bondholders, but the consummation of that trust, without the intervention of a court, and pursuant to the purposes and provisions of the agreement.

With the stock and debentures under the legal ownership of the committee with unlimited power to deal therewith for the benefit of the certificate holders, the operation by and through the Trustee Corporation was begun and continued for nine years. It is conceded that the management and conduct of the business was exceptionally good, and, if it is material, was more successful than the efforts made to rehabilitate any of the many hotels on the Mississippi Coast which failed during the depression[7].

No question was raised until Respondent Ball, having acquired a competing property, the largest hotel on the coast, but not as favorably situated for continuous operation, be-

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[5]Mississippi Code of 1930, Sec. 3348.—"Hereafter all Declarations or creations of trusts or confidence of or in any land shall be made and manifested by writing, signed by the party who declares or creates such trust, or by his last will, in writing, or else they shall be utterly void; and every writing declaring or creating a trust shall be acknowledged or proved as other writings, and shall be lodged with the clerk of the chancery court of the proper county to be recorded, and shall only take effect from the time it is so lodged for record, but where any trust shall arise or result, by implication of law, out of a conveyance of land, such trust or confidence shall be of the like force and effect the same as it would have been if this statute had not been passed."

[6]R. 68.

[7]R. 364, 374, 378, 382, 386, 252-257.

came the owner of 223 certificates of participation in December, 1938[8]. These were acquired through the First National Bank in Meridian, which had large holdings acquired through the purchase of the assets of its predecessor on liquidation, and which acquired others for Respondent. These certificates had been objected to by the Comptroller, as assets of the bank, and it was necessary to block a large quantity to affect a sale[9]. Thereupon, Respondent began to demand a voice in the Committee action, and when the time arrived for the exercise of the option to refund, adopted obstructionist tactics. Considering Mr. Ball a prospective purchaser, the Committee attempted to mollify him in every way possible[10]. Acting on the advice of their attorneys[11], the Committee refused to accord to Ball the voice and control he demanded, and thereupon he instituted this action.

On the trial, the District Court held that the terms of the Protective Agreement, as well as of the Declaration of Trust, controlled the actions, functions and duties of the Committee[12], and that the trust was terminable only on the agreement of all the beneficiaries, the liquidation of the trust by the trustees, or their determination that the trust should be terminated and the property, whether stocks, bonds or other assets, should be delivered to the certificate holders. Thereupon the court dismissed the complaint[13].

On appeal, the majority of the Circuit Court of Appeals held that the Protective Agreement did not apply to the securities issued by the Trustee Corporation, but applied only to the original bonds[14], and that the trust terminated as soon

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[8]R. 29.
[9]R. 547, 549, 436.
[10]R. 263, 264-287, 434, 577-584.
[11]R. 249, 423-430.
[12]R. 608-612.
[13]R. 621.
[14]R. 649.

as the Trustee Corporation had paid the obligations assumed by the Committee[15]. It held that the Committee had abused its discretion in electing to refund under the terms of the existing mortgage[16]. However, being unwilling to destroy the trust under these drastic holdings, it directed the District Court to control the delivery of the trust property as to time and conditions, thus empowering the court to require a continued holding by the trustees after their legal title had been extinguished. It further directed that the court determine whether some other appropriate relief should be granted to Respondents. No suggestion of what this other appropriate relief might be appears in the opinion. If it is to be a reorganization, as in Bankruptcy; or a receivership, as in the alternative prayer of the complaint; the court is not to have the guidance of the Protective Agreement, because that has become *functus officio* under the majority holding; or of the Committee, which has been successful in its operations, since their obligations arose from a legal title which has been extinguished[17].

SUMMARY OF ARGUMENT

I.

THE CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF LOCAL LAW IN A WAY WHICH IS PROBABLY IN CONFLICT WITH LOCAL DECISIONS.

State, ex rel. Knox, Atty. Gen., v. Edward Hines Lbr. Co., 150 Miss. 1, 115 So. 598;

Hiscrodt v. Hamlett, 74 Miss. 37, 20 So. 143.

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[15]Note that under this theory, the debentures and stock should have been distributed in 1931, after the corporation had obtained funds under a prior mortgage and paid the obligations in question.

[16]R. 650.

[17]In this connection it should be noted that during their service, the committee members were not permitted to receive any compensation. R. 66—(Protective Agreement, Par. Tenth).

II.

THE CIRCUIT COURT OF APPEALS HAS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF PROCEEDINGS IN SUCH MANNER AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Constitution of Mississippi, Secs. 156, 157 and 159; (See Miss. Code 1930);

Nelson v. Ratliff, 72 Miss. 656, 18 So. 487;

Ray v. Kelly, 82 Miss. 597, 35 So. 165;

Anderson v. Love, 169 Miss. 219, 153 So. 369;

Amis v. Smith, 16 Pet. 303, 10 L. Ed. 973;

Edward Hines Yellow Pine Trustees v. Martin, 268 U. S. 458, 45 Sp. Ct. 543, 69 L. Ed. 1050;

Erie R. Co. v. Tompkins, 304 U. S. 64, 58 Sp. Ct. 817, 82 L. Ed. 1188;

Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 58 Sp. Ct. 860, 82 L. Ed. 1290.

III.

THE CIRCUIT COURT OF APPEALS HAS FAILED TO FOLLOW A RULE OR PROCEDURE PROMULGATED BY THIS COURT, AND ITS ACTION DEMONSTRATES THE NECESSITY FOR AN EXPOSITION BY THIS COURT OF THE SCOPE AND EFFECT OF THE RULE.

Stoltz v. United States, (9 Cir.) 99 F. 2d, 285;

Bonding and Insurance Co. v. Preferred Insurance Co., (6 Cir.) 110 F. 2d, 764;

Drybrough v. Ware, (6 Cir.) 111 F. 2d, 548.

IV.

THE RIGHTS OF MINORITY INTERESTS AND TRUSTEES UNDER BONDHOLDERS' PROTECTIVE AGREEMENTS CREATING COMMON LAW TRUSTS IN STATES WHERE SUCH TRUSTS ARE VALID UNDER THE ENGLISH DOCTRINE OF USES UNDER THE STATUTE OF 27, HENRY VIII, SHOULD BE EXAMINED BY THIS COURT AND RELATED TO THE PRACTICE AND PROCEDURE IN FEDERAL COURTS.

Brown v. West's Heirs, 7 How. (8 Miss.) 181;

Murdock v. Hughes, 7 Smedes and M. (15 Miss.) 219;

Nelson v. Ratliff, 72 Miss, 656, 18 So. 487;

Hiserodt v. Hamlett, 74 Miss. 37, 20 So. 143;

Enochs & Flowers, Ltd. v. Roell, 170 Miss. 44, 154 So. 299;

Brown v. Sperry, 182 Miss. 488, 181 So. 734;

Tanous v. White, 186 Miss. 556, 191 So. 278;

Thompson v. Schmitt, 115 Tex. 53, 274 S. W. 554;

Howe v. Keystone Pipe and Supply Co., 115 Tex. 158, 274, S. W. 563;

Mississippi Code of 1930—Sec. 3848;

Pomeroy's Equity Jurisprudence (Fourth Ed.) Secs. 1003-5.

V.

THE CIRCUIT COURT OF APPEALS HAS DECIDED THIS ACTION ON A THEORY NOT PRESENTED BY THE RECORD BEFORE IT, WITHOUT GIVING THE PARTIES AN OPPORTUNITY TO BE HEARD THEREON, THUS DEPRIVING PETITIONERS OF THEIR DAY IN COURT.

Lutcher & M. Lbr. Co. v. Knight, 271 U. S. 257, 30 Sp. Ct. 505, 54 L. Ed. 757;

Sanders v. Shaw, 244 U. S., 317, 37 Sp. Ct. 638, 61 L. Ed. 1163;

Willing v. Binenstock, 302 U. S. 272, 58 Sp. Ct., 175, 82 L. Ed. 248;

Collins v. Yosemite Park Co., 304 U. S. 518, 58 Sp. Ct. 1009, 82 L. Ed. 1502.

ARGUMENT

The court will have seen that this is a contest between petitioners, serving without compensation, struggling to hold unity of ownership, control and management for the equal benefit of all concerned, as against the purchaser of a majority interest in the estate, who frankly states that he wishes to exercise a control that will be to his individual advantage[18]. Thus, no apology will be offered, nor excuse given for the alleged disfranchisement of Respondent and his large equitable interest in the stock and debentures.

I.

THE CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF LOCAL LAW IN A WAY WHICH IS PROBABLY IN CONFLICT WITH LOCAL DECISIONS.

The Circuit Court of Appeals has held that the Bondholders' Protective Agreement was rendered *functus officio* by the Declaration of Trusts and the acquisition by the Committee of the debentures and stock of the Trustee Corpora-

[18]R. 569, 582, 548, 40(d); A chain management with the Hotel Markham as one of the base properties of a holding company pyramid, may or may not be to the advantage of the certificate holders, but the election to allow the certificates to be transposed into stock in one of the operating companies must be made by petitioners, under the terms of the trust.

tion. The majority, speaking through a Judge from the State of Texas where Common Law Trusts are inoperative[19], with the concurrence of a Judge from the State of Louisiana, which models its laws upon the Code of Napoleon, have overruled the holding of a Judge from Alabama, whose laws are similar to those of Mississippi[20], and the trial Judge in Mississippi[21].

The validity, powers, existence, and characteristics of business trusts under the laws of the State of Mississippi are discussed at some length in the case of *State ex rel Knox, Atty. Gen., v. Edward Hines Lumber Co.*, 150 Miss. 1, 115 So. 598[22]. It does not seem appropriate to argue to this court that the consummation of a resulting trust arising out of a contractual relationship created by a protective agreement and the deposit of bonds thereunder, by the declaration of the express trust by the holders of the legal title to the property, that they would carry out the terms of and perform the duties imposed by the original covenant, including unity of control and management, could render the original charter *functus officio*, destroy the utility of the trust, and render the signers of the declaration of trust, trustees only because of their own wrong in continuing to hold and act as such.

The action of the Circuit Court of Appeals should be reviewed by this court.

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[19] *O'Dell v. Grubstake Investment Association* (Tex. Civ. App.) 38 S.W. 2d, 151, 152.

[20] Cf. *Alabama Code of* 1923, Sec. 6917, and *Mississippi Code of* 1930, Sec. 3348.

[21] Note also that the trial Judge may sit with the Circuit Court by designation. The situation is similar to that in John Hancock Mut. L. Ins. Co. v. Bartels, 308 U. S., 180, in which this court granted the writ because of the differing views of the judges within the circuit.

[22] See 150 Miss. 51, 115 So. 606, quotation from *Hiserodt v. Hamlett*, 74 Miss. 37, 20 So. 143: "One may do what he will within legal limits, with his own. He may declare a trust absolute, never thereafter having, in anywise, the right to interfere with it, or he may declare a trust revocable upon a named contingency."

II.

THE CIRCUIT COURT OF APPEALS HAS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF PROCEEDING IN SUCH MANNER AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

In its majority opinion, the court says:

> "But a reading of the protective agreement discloses no word or line in it with regard to protecting minority from majority holders . . ."

It then proceeds to consider the protective agreement as separate and distinct from the declaration of trust.

This treatment ignores the complete distinction preserved in Mississippi between courts of law and courts of equity[23]. The regulation and enforcement of trusts is one of the original inherent powers of a court of equity[24], and Mississippi courts of equity recognize the rule that equity regards substance rather than form[25].

Ignoring the purpose and effect of the agreement and declaration, the Circuit Court of Appeals authorized the District Court to order the delivery of the trust property to the certificate holders. In so doing, it held that the legal title and right to immediate possession had merged with the equitable title. If this had been true, the trust had ended[26]. But how had it terminated? Not by limitation, for there was none, and this being a business trust, it required no limi-

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[23]Cf. *Constitution of Mississippi*, Secs. 156, 157, and 159; *Smith v. Everett*, 50 Miss. 575.
[24]*Clews v. Jamieson*, 182 U. S. 461, 21 Sp. Ct. 845, 45 L. Ed. 1183.
[25]*Dogan v. Cooley*, 184 Miss. 106, 185 So. 783, 787.
[26]*Healey v. Alston*, 25 Miss. 190.

tation. Not by the election of the trustees, for they are here petitioning for its preservation. Not by a reorganization, because later in the majority opinion, the Appellate Court attempts to authorize the trial court to reorganize, or take further measures, none of which it could do if a reorganization had been perfected. If the merger had occurred, by an executed plan of reorganization, or by other means, the court could not have kept the trust alive as such, but would have been bound to order immediate surrender of the stocks and debentures.

Under Mississippi Law, a trust will be preserved according to the strict letter of the instrument creating it[27]. This is a settled rule of property in Mississippi[28]. Therefore, it was binding upon the Circuit Court of Appeals[29]. It was the duty of the Circuit Court of Appeals to apply the rule as established in Mississippi[30], including such principles as are applicable in the local courts of equity[31]. This court should exercise its power of supervision.

III.

THE CIRCUIT COURT OF APPEALS HAS FAILED TO FOLLOW A RULE OF PROCEDURE PROMULGATED BY THIS COURT, AND ITS ACTION DEMONSTRATES THE NECESSITY FOR AN EXPOSITION BY THIS COURT OF THE SCOPE AND EFFECT OF THE RULE.

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[27] *Ray v. Kelly*, 82 Miss. 597, 35 So. 165.

[28] See *Anderson v. Love*, 169 Miss. 219, 153 So. 369, quoting *Bogert on Trusts* (7th Ed.), Sec. 104, and citing *Nelson v. Ratliff*, 72 Miss. 656, 18 So. 487.

[29] *Amis v. Smith*, 16 Pet. 303, 10 L. Ed. 973; *Edward Hines Yellow Pine Trustees v. Martin*, 268 U. S. 458, 45 Sp. Ct. 543, 69 L. Ed. 1050.

[30] *Erie R. C. v. Tompkins*, 304 U. S. 64, 58 Sp. Ct. 817, 82 L. Ed. 1188

[31] *Ruhlin v. New York L. Ins. Co.*, 304 U. S. 202; 58 Sp. Ct. 860, 82 L. Ed. 1290.

The District Court did not find the facts specially and state separately its conclusions of law thereon as required by Rule 52 of the Rules of Civil Procedure. However, it filed a comprehensive opinion and directed the entry of the appropriate judgment. The rule provides that "Findings of fact shall not be set aside unless clearly erroneous." In such a case, we may invisage three possible courses which might have been open to the appellate court. It might have remanded the cause for more definite and specific findings; or treated the record as before it for trial de novo as in admiralty cases; or it might have treated the opinion as a sufficient finding of fact and separate statement of conclusions of law, and proceeded to apply the remainder of paragraph (a) of the rule, binding itself to treat as fact that which was found as fact, unless clearly erroneous. The Sixth Circuit Court of Appeals has held[32] that failure to request or object under Rule 46 precludes the party from raising the point on appeal, but this would create a repugnancy between Rule 46 and that portion of Rule 52 which provides "Requests for findings are not necessary for purposes of review." Moreover, it seems gratuitous when the possibility of a request under Rule 46, being denied is considered in connection with the problem of the reviewing court. On a request being denied, would the reviewing court be required to remand the action for more specific findings if it found the opinion sufficient for purposes of review? Obviously, the appellate court could treat the delinquency as harmless error under Judicial Code Sec. 269 (28 U. S. C. A. 391)[33]. But if it be

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[32] *Bonding and Insurance Co. v. Preferred Insurance Co.*, 110 F. 2d, 764.
Drybrough v. Ware, 111 F. 2d, 548. With deference it is suggested that the rule imposes a duty upon the courts without regard to the conduct of the parties.

[33] *Stoltz v. United States*, (9 Cir.) 99 F. 2d. 285.

found to be harmless error, it necessarily follows that the facts are sufficiently stated, and the findings may not be set aside unless clearly erroneous.

A reading of the majority opinion discloses that the court treated the whole matter as one for its decision *de novo.* It proceeded to a consideration of the record without reference to the findings of the trial court, except to comment on their insufficiency as to the purposes of the protective agreement and abuse of discretion by the trustees[34]. The court then proceeded to reverse the District Court, without consideration of whether it had found facts or stated conclusions. It says, "We think he was wrong in both particulars", but it does not say that the trial court was clearly erroneous. It does not mention the array of testimony to the contrary, which the District Court excluded because it found no confict between the documents under consideration, and that their provisions controlled as to bonds as well as stock and debentures[35]. No authorities are cited, and no statement or rule of law is mentioned. The Circuit Court of Appeals finds that the Committee has abused its discretion by attempting to project its control over a period greater than ten years. The whole matter is discussed as if it were within the sole discretion of the Court of Appeals and as if conclusions and results were mere matters of fact.

Where this ten-year prototype of the rule against perpetuties originated is known only to the court. Like its great predecessor, it seems to be a logical monstrosity, since indefinite factors can never yield a definite result[36]. In order

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[34]R. 649.

[35]R. 610-11, 616, 618. Cf. R. 649,—last sentence, continued on page 650.

[36]The rule against perpetuities does have the saving grace of preserving indefiniteness to the extent of the life in being, but under this case, the rule is either ten years or between ten and twenty years, the latter view producing two definite quantities instead of one.

to clothe this finding with a semblance of logical decency, it must be classed as a rule of law that ten years is the limit of time during which settlers may project a business trust[37]. But aside from the conflict with local decisions, the rule is invoked to prevent the exercise of a power and option which the court does not and can not say was improperly reserved.

It is believed that an exposition of Rule 52 will be of great assistance, both to bench and bar.

IV.

THE RIGHTS OF MINORITY INTERESTS AND TRUSTEES UNDER BONDHOLDERS' PROTECTIVE AGREEMENTS CREATING COMMON LAW TRUSTS IN STATES WHERE SUCH TRUSTS ARE VALID UNDER THE ENGLISH DOCTRINE OF USES UNDER THE STATUTE OF 27, HENRY VIII, SHOULD BE EXAMINED BY THIS COURT, AND RELATED TO PRACTICE AND PROCEDURE IN THE FEDERAL COURTS.

A noted author[38] tells us that the legislation of several states[39] had important effects on the growth and development of trusts, where adopted to regulate and prohibit their use. From some of these jurisdictions come announcements which are strange to states where the English rule prevails. Under the same words of conveyance in a trust instrument, the trustee may hold all title, both legal and equitable, with only a thing in action vested in the cestui qui trust; or all title may pass to the beneficiary, by operation of statute as under the original Statute of Uses, but the powers remain in the trustee until exhausted.

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[37]Cf. *Nelson v. Ratliff*, 72 Miss. 656, 18 So. 487; *Hiserodt v. Hamlett*, 74 Miss. 37, 20 So. 143.

[38]*Pomeroy's Equity Jurisprudence* (Fourth Edition) Secs. 1003-5.

[39]New York, Michigan, Wisconsin, Minnesota, California, and North Dakota.

This separation of powers from estates or interests in the trust property was the outgrowth of special statutes under the seasoning influence of the necessities of the business community. The same political and economic influences which brought about the development of business trusts have brought surprisingly similar results throughout the land[40]. This division of trust powers from title for judicial purposes would appear to be advantageous where law and equity are fully merged, and for practical purposes distinctions are a mere matter of terminology. But in states where the existence of the trust depends upon the separation of the legal and equitable estates[41], the Federal courts must not disregard fundamental distinctions if the rights of the parties under local law are to be preserved.

In the instant case the protective agreement was sufficient in all respects to create a trust in the bonds of the Gulfport Hotel Company, and to authorize all subsequent acts of the trustees. However, it was not sufficient to create an express trust in the real estate upon which the bond mortgage was given, since it was created by the bondholders on their depositing their bonds, and since they had not signed the writing creating the trust as required by statute[42]. But the depositing bondholders were contractually obligated to each other to create a trust and had designated the trustees as their agents to perfect it. The contract had been performed only to the extent that the trustees held the legal title under a resulting trust[43], and it became necessary for the trustees

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[40]Texas seems to be alone in having invalidated any form of business trust and transposing it into a partnership without statutes directly relating to the subject. *Howe v. Keystone Pipe and Supply Co.*, 115 Tex. 158, 274 S. W. 563; *Thompson v. Schmitt*, 115 Tex. 53, 274 S. W. 554.

[41]Cf. *Enochs & Flowers, Limited, v. Roell*, 170 Miss. 44, 154 So. 299.

[42]*Mississippi Code* 1930, Sec. 3348, *supra* note 5.

[43]*Brown v. West's Heirs*, 7 How. (8 Miss.) 181; *Murdock v. Hughes*, 7 Smedes and M. (15 Miss.) 219. *Tanous v. White*, 186 Miss. 556, 191 So. 278.

to execute a declaration of trust in the performance of their obligations under the protective agreement. Holding the legal title, they were empowered to declare the trust by the terms of the agreement. Thereafter, in the performance of these same obligations, the trustee corporation was formed and the property was transferred to it. This conveyance of the legal title to the land terminated the declared trust as to it, but did not destroy the trust created by the protective agreement. It substituted the debentures and stock, which were personal property, for the land in which it declared a trust. The trust created in the protective agreement, having been preserved through the medium of the declaration of trust, continued to be operative and would control, as against the declaration. Thus we have the example of a division of legal and equitable title, with two changes in the nature as well as the corpus of the legal estate, but no change in the nature of the equitable estate.

The only apparent explanation for the action of the court in this case is that the majority thought that the conveyance of the trust property to the Trustee Corporation, for the debentures and stock, was a surrender of the legal title to the trust properties with the retention by the trustees of the powers they had acquired through the acquisition of the securities[44]. If this be the true reason, the court has confused ordinary trusts with powers in trust resulting from conveyances under special statutes. The powers existed, if at all, because of the legal ownership of the stocks and debentures, and this could not be questioned under the trust documents. The equitable rights of the original bondholders or their assigns, now certificate holders, had undergone no qualitative change whatever[45]. Since the qualitative na-

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[44]Cf. R. 649-50.
[45]*Brown v. Sperry*, 182 Miss. 488, 181 So. 734.

ture of the rights, powers and duties of trustees and cestui qui trust are and must be in equilibrium, the powers and duties of the trustees remain the same throughout the various transfers.

V.

THE CIRCUIT COURT OF APPEALS HAS DECIDED THIS ACTION ON A THEORY NOT PRESENTED BY RECORD BEFORE IT, WITHOUT GIVING THE PARTIES AN OPPORTUNITY TO BE HEARD THEREON, THUS DEPRIVING PETITIONERS OF THEIR DAY IN COURT.

It has been noted that the Circuit Court of Appeals did not propose to destroy the trust involved in this action without further proceedings. These further proceedings involved considerations ranging from a delay in granting the relief prayed, during which it is presumed the matter would remain in the same status; to some other appropriate relief, presumably a reorganization of the Trustee Corporation. At one extreme, we have these petitioners compelled to act as trustees of a bare legal power, which is not what they contracted to do; and required to serve under direction of the court, which all wished to avoid; and to do so without compensation, which the court could not compel. At the other extreme, a reorganization would be effected in which petitioners would be denied the exercise of their powers, but compelled to act on behalf of the minority group without the safeguards of the agreements that all interested had entered into.

Neither of these extremes, nor any result which might lie between them are within the prayer of the complaint filed[46]. The issues as made up were whether or not Respond-

[46]R. 51.

ent should have the debentures and stock, or the appointment of a receiver; or whether or not his complaint would be dismissed. However, the opinion of the court fixes the law of the case, and on remand, petitioners are confronted with contingencies not within their reasonable contemplation prior to the decision in question. Therefore, they have been denied their day in court, and this court should grant the writ[47].

CONCLUSION

For all of the reasons mentioned, and for reasons which will appear to the court, it is submitted that the Petition for Writ of Certiorari should be granted in order that this court may examine and reverse the judgment of the Circuit Court of Appeals in this action.

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[47] *Lutcher & M. Lbr. Co. v. Knight*, 217 U. S. 257, 267, 30 Sp. Ct. 505, 54 L. Ed. 757; *Sanders v. Shaw*, 244 U. S. 317, 37 Sp. Ct. 638, 61 L. Ed. 1163; *Willing v. Binenstock*, 302 U. S. 272, 58 Sp. Ct. 175, 82 L. Ed. 248; *Collins v. Yosemite Park Co.*, 304 U. S. 518, 58 Sp. Ct. 1009, 82 L. Ed. 1502.